(7)



No. 97-2048

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

**WILLIAM D. O'SULLIVAN,**

*Petitioner,*

v.

**DARREN BOERCKEL,**

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED JUNE 17, 1998**

**CERTIORARI GRANTED NOVEMBER 16, 1998**

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## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

January 10, 1979 – Boerckel's convictions and sentences affirmed on direct appeal to the Illinois Appellate Court, Fifth District.

May 31, 1979 – The Illinois Supreme Court denies Boerckel's petition for leave to appeal.

June 9, 1980 – The Supreme Court denies Boerckel's petition for writ of *certiorari*.

September 26, 1994 – Boerckel files a *pro se* petition for writ of *habeas corpus* in the United States District Court for the Central District of Illinois, Springfield Division.

January 31, 1995 – District Court appoints counsel for Boerckel.

March 15, 1995 – Amended petition for writ of *habeas corpus* filed by counsel on Boerckel's behalf.

June 23, 1995 – O'Sullivan files an answer to the *habeas corpus* petition.

November 15, 1995 – District Court enters an order finding that Boerckel had procedurally defaulted three of his six claims for failure to include these claims among those raised before the Illinois Supreme Court on petition for leave to appeal. The District Court orders Boerckel to address cause and prejudice for his procedural defaults.

December 15, 1995 – Boerckel files supplemental pleading on procedurally defaulted claims

January 17, 1996 – O'Sullivan files brief in response to Boerckel's supplemental pleading

October 28, 1996 – District Court issues order denying the amended *habeas corpus* petition.

November 25, 1996 – Boerckel files a motion for issuance of a certificate of appealability with the District Court.

November 27, 1996 – Boerckel files a notice of appeal from the denial of his *habeas corpus* petition with the District Court.

December 4, 1996 – District Court denies Boerckel's motion for issuance of a certificate of appealability.

December 16, 1996 – Boerckel files a motion for issuance of a certificate of appealability with the United States Court of Appeals for the Seventh Circuit.

April 2, 1997 – Court of Appeals grants request for certificate of appealability and sets briefing schedule.

October 20, 1997 – Oral argument heard and the Court of Appeals takes the matter under advisement.

February 9, 1998 – Court of Appeals reverses the District Court's dismissal of the habeas petition and remands for further proceedings.

March 9, 1998 – O'Sullivan files Petition for Rehearing with Suggestion for Rehearing *En Banc*.

March 20, 1998 – Court of Appeals enters order denying Petition for Rehearing with Suggestion for Rehearing *En Banc*.

March 30, 1998 – Court of Appeals issues its mandate.

June 17, 1998 – O'Sullivan files Petition for Writ of *Certiorari* in the United States Supreme Court.

June 19, 1998 – Case placed on Supreme Court docket.



November 16, 1998 – United States Supreme Court enters order granting the Petition for Writ of *Certiorari*.

November 17, 1998 – O'Sullivan files an emergency motion for a stay of the proceedings pending before the District Court.

November 20, 1998 – Supreme Court enters order granting O'Sullivan's emergency motion for a stay of the proceedings pending before the District Court.

[Entered October 28, 1996]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

| | | |
|---|---|---|
| DARREN E. BOERCKEL, | ) | |
| | ) | |
| Petitioner, | ) | |
| v. | ) | No. 94-3258 |
| | ) | |
| | ) | |
| WILLIAM D. O'SULLIVAN, | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on Petitioner's amended petition for a writ of habeas corpus.

I. BACKGROUND

Darren E. Boerckel filed a petition for writ of habeas corpus pro se. After encountering difficulty understanding the allegations of the petition, the Court appointed counsel, who then filed an amended petition. In the amended petition, Boerckel states six potential grounds for relief:

1) That he did not knowingly and intelligently waive his *Miranda* rights;

2) That his confession was involuntary;

3) That the evidence against him was insufficient to support a guilty verdict;



4) That his confession was the fruit of an illegal arrest;

5) That he received ineffective assistance of both trial and appellate counsel; and

6) That his right to discovery under *Brady v. Maryland* was violated.

After ordering the State to respond to the petition, the Court issued a number of rulings. The Court rejected Boerckel's fourth ground for relief, finding it barred by the rule enunciated in *Stone v. Powell*, 428 U.S. 465 (1976). The Court also concluded that Boerckel's sixth ground for relief was not procedurally defaulted and should be addressed on the merits. Finally, the Court determined that the first, second, third, and fifth grounds were procedurally defaulted.

After its initial rulings, the Court requested further briefing. Specifically, the Court asked Boerckel to address the issues of cause for or prejudice from his procedural defaults on grounds one, two, three, and five. The Court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial response.

In response to the Court's order, Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the Court should hear his procedurally defaulted claims under the actual innocence or fundamental miscarriage of justice exception to the cause and prejudice standard. Boerckel claimed to have uncovered facts not available at the time of his original trial which cast doubt on Boerckel's conviction. Generally, Boerckel's "new" evidence was that Gary Martin, an individual who had been a suspect initially, may have been involved in the crime. In support of his claim,

Boerckel submitted an affidavit from an investigator and summaries of witness interviews conducted by the investigator.

The Court concluded that a hearing would be necessary in order to resolve Boerckel's claim of actual innocence. A hearing would allow the Court to receive testimony from the individuals Boerckel's investigator had interviewed and to assess the credibility and probative value of their testimony. The state objected to such a hearing in a motion for reconsideration filed shortly before the hearing date. The Court denied the motion for reconsideration, largely because it had been filed so close in time to the hearing date. The Court noted, however, that it might revisit some of the issues raised in the State's motion.

In this Order, the Court will rule on the remaining issues raised by Boerckel's petition. The Court will thoroughly evaluate the State's arguments in opposition to a hearing and the Court will reexamine its conclusion that the actual innocence exception to the cause and prejudice standard applies to this case. The Court concludes that it does. The Court will then address novel issues generated by the recent amendments to 28 U.S.C. § 2254. The Court will then evaluate Boerckel's claim of actual innocence. Finally, the Court will address Boerckel's single claim that is not procedurally defaulted.

## II. THE STATE'S OBJECTIONS TO THE HEARING

The Court initially denied the State's motion for reconsideration of the Court's order setting the cause



for a hearing. The Court now revisits the issues raised in the motion. The Court concludes that while a hearing was permissible under prior law, the recent amendments to 28 U.S.C. § 2254 prohibit evidentiary hearings in cases such as this.

### A. *Miscarriage of Justice Exception*

Admitting that no cause exists for his procedural defaults, Boerckel invokes what is known as the "actual innocence or miscarriage of justice" exception to the cause and prejudice rule. Actual innocence means two things in habeas corpus jurisprudence. First, it refers to a substantive claim (which is probably limited to capital cases) that the petitioner is entitled to relief solely because he is innocent. *See Herrera v. Collins*, 506 U.S. 390 (1993). Second, it refers to a claim that acts as a gateway through which a petitioner may obtain review of procedurally defaulted claims. The Supreme Court described this second type of actual innocence claim thus:

> In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 (1992), decided last Term, we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons. But this body of our habeas jurisprudence is not itself a constitutional claim, but

> instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.

*Herrera*, 506 U.S. at 404 (citation omitted).

In *Schlup v. Delo*, 115 S. Ct. 851 (1995), the Supreme Court refined the concept of the gateway claim of actual innocence. In particular, the Court set the standard for evaluating such claims. *Schlup* involved a successive habeas petition filed by a man convicted of murder and sentenced to die. The petitioner asserted ineffective assistance of counsel at trial and failure by the prosecution to turn over exculpatory evidence, claims he had not asserted in his first federal habeas petition. The petitioner could not establish cause and prejudice for his default, so the Court concluded that he could only bring his claims if he could establish his claim of actual innocence.[1] The Court had two options from which to

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[1] The Court explained the rationale for the actual innocence gateway. Habeas corpus exists as a remedy for violations of a prisoner's constitutional rights at trial, not as a vehicle for reexamining the question of factual guilt. *Herrera*, 506 U.S. at 400. Therefore, when a person who has received an error free trial claims innocence, habeas courts will seldom, if ever, grant the writ. But a claim of innocence accompanied by a claim of constitutional error at trial requires greater scrutiny. *See Schlup*, 115 S. Ct. at 861. The Supreme Court noted that Schlup's conviction might be entitled to less respect than Herrera's because Schlup claimed error at trial. But the Court continued:

> Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim. However, if a peti-

(continued...)



choose a standard for evaluating gateway claims of actual innocence: the standard established in *Sawyer v. Whitley*, 505 U.S. 333 (1992),[2] for claims that a petitioner was actually innocent of the death penalty or the standard suggested in *Murray v. Carrier*, 477 U.S. 478 (1986),[3] and *Kuhlmann v. Wilson*, 477 U.S. 436 (1986).[4]

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[1] (...continued)

> tioner such as Schlup presents evidence of innocence so strong that a court cannot have confidence in the outcome of trial unless it is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.

*Id.*

[2] *Sawyer* established when a habeas petitioner who brings a "successive, abusive, or defaulted federal habeas claim has shown he is 'actually innocent' of the death penalty to which he has been sentenced so that the court may reach the merits of his claim." 505 U.S. 333, 335 (1992). The Court held that to use actual innocence of the death penalty as a way around a procedural defense, a petitioner must show "by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law." *Id.* at 350.

[3] In *Murray v. Carrier*, the Court considered whether a petitioner whose competent attorney had inadvertently failed to raise an issue on appeal had stated cause for his procedural default. The Court noted that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause and prejudice for the procedural default." 477 U.S. at 496.

[4] In *Kuhlmann v. Wilson*, the Court set out to "define the considerations that should govern federal courts' disposition of successive petitions for habeas corpus." The Court sought to define when, in the "interests of justice" federal courts should

(continued...)

The Court held that the standard articulated in *Carrier*—that the constitutional violation probably resulted in the conviction of an actually innocent person—applied "when a petitioner who has been sentenced to death raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits of his constitutional claims." 115 S. Ct. at 867. Because the Court had been vague in *Carrier*, it further defined a petitioner's burden in *Schlup*. The Court concluded that a petitioner must "show that it is more likely than not that no reasonable juror would have

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[4] (...continued)

entertain successive petitions. The Court concluded that "the 'ends of justice' require federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." *Id.* at 454.

The Court focused on defining "the interests of justice" because that language had appeared in an early version of the habeas statute. 477 U.S. 436. The statute, 28 U.S.C. § 2244, required federal courts to satisfy themselves that "the ends of justice will not be served by" entertaining successive petitions. *Id.* (quoting 28 U.S.C. § 2244 (1964)). In 1966, Congress rewrote the habeas statute, this time omitting reference to the ends of justice.

This change presented the Court with the question of whether federal courts still had to make an ends of justice inquiry. The Court concluded that they did. 477 U.S. at 451 (It is clear that Congress intended for district courts, as a general rule, to give preclusive effect to a judgement denying on the merits a habeas petition alleging grounds identical in substance to those raised in the subsequent petition. But the permissive language of § 2244(b) gives federal courts discretion to entertain successive petitions under some circumstances.") The Court then set about the task of determining what those circumstances were, an undertaking started, but not finished, in *Sanders v. United States*, 373 U.S. 1 (1963).



convicted him in light of the new evidence." *Schlup*, 115 S. Ct. at 867. In other words, a petitioner must "persuade the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* at 868. In making its decision, a court must presume "that a reasonable juror would consider fairly all of the evidence presented [and] . . . that such a juror would conscientiously obey the instruction of the trial court requiring proof beyond a reasonable doubt." *Id.*

Boerckel makes a gateway claim of actual innocence. Doing so raises three important questions: 1) is such a claim available to Boerckel, who was not sentenced to death, 2) is the concept available in a case where the claim of innocence is in no way linked to the alleged constitutional violations, and 3) if the exception applies, has Boerckel met his burden of showing actual innocence?

In its motion for reconsideration of the Court's order setting the case for a hearing, the State argued that the actual innocence exception applies in capital cases. The Court initially ruled that this argument was waived by the state's failure to raise it in response to Boerckel's supplemental pleading on the issue of procedural default. After further consideration, the Court concludes that the state's first argument is also incorrect.

The State's position has some support in the text of *Schlup*. After all, the Supreme Court stated its holding with explicit reference to "a petitioner who has been sentenced to death . . . ." 115 S. Ct. at 867. But the cases from which the Court derived its standard did not involve the death penalty. *See Kuhlmann*, 477 U.S. at

441 (prisoner had been sentenced to 20 years to life and a concurrent term of 7 years); *Carrier*, 477 U.S. 482 (prisoner had been convicted of rape and abduction). Furthermore, the State's rationale is, in large part, that just because the Supreme Court has not applied the actual innocence exception to a noncapital case since deciding *Schlup* (in 1995), that the rule must not apply to a noncapital case. That logic is unconvincing, given the history of the actual innocence exception and the small number of cases the Supreme Court hears in a year. Finally, the State relies on an Eighth Circuit case that does not genuinely support its position. The state cites *Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996). The Eighth Circuit said: "Assuming for purposes of analysis that the fundamental miscarriage of justice exception applies to non-capital cases, Frizzell made no claim of factual innocence." *Id.* That statement is hardly an overwhelming endorsement of the state's position, especially since the Eighth Circuit has applied the standard to noncapital cases. *Whitmore v. Avery*, 63 F.3d 688, 689 (8th Cir. 1996) (arising out of a drug conviction, applying *Schlup* on remand from the Supreme Court "for further consideration in light of [*Schlup*]") (quoting *Whitmore v. Avery*, 115 S. Ct. 1086 (1995)).

The State's second objection to using the actual innocence exception is that Boerckel's claim of actual innocence is not linked to the constitutional violations he alleges in his petition. The State asserts that the actual innocence exception is only available in cases where the petitioner claims that a constitutional violation kept the jury from hearing evidence that would have established his innocence. The Court disagrees.



Although the *Schlup* case involved claims of factual innocence that were somewhat linked to alleged constitutional violations, the Supreme Court's discussion did not unequivocally announce that a linkage must exist. *See* 2 James S. Liebman and Randy Hertz, Federal Habeas Corpus Practice and Procedure 1995 Supp. at 107, n. 8.06 (citing various passages in the *Schlup* opinion that indicate a delinking of the claim of innocence and the alleged constitutional violation). In particular, the Court in *Schlup* directed lower courts to review all alleged evidence of innocence when ruling on such claim, including inadmissible evidence. Such a directive is inconsistent with the notion that courts should only hear claims of actual innocence that are supported by evidence wrongly excluded from the trial. 115 S. Ct. at 867-68. *See also Frizzell v. Hopkins*, 87 F.3d 1019, 1021 (8th Cir. 1996) (remarking that the Supreme Court in *Schlup* held that "factual innocence is [a] 'gateway' to consideration of independent constitutional violation otherwise barred by procedural default.").

The state makes another argument that is ancillary to its suggestion that the alleged constitutional violations and the evidence of innocence must be linked. The state argues that Boerckel's evidence is not "newly discovered evidence" within the meaning attached to that phrase in habeas corpus jurisprudence because it is not evidence that bears upon a constitutional violation. This assertion comes from a misunderstanding of *Herrera*. Citing *Herrera*, the State asserts that "As a general rule, newly discovered evidence that relates only to petitioner's guilt or innocence is not reviewable by a federal court on a motion for habeas corpus relief." Motion for Reconsideration at 8. In *Herrera*, the Su-

preme Court rejected a claim that evidence of actual innocence was itself evidence of a constitutional violation—the Supreme Court was talking about the first type of actual innocence, not the second, gateway type of actual innocence claim. 506 U.S. at 400 ("Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."). The Supreme Court's purpose was to reject, as a general proposition, the claim that a habeas court is a forum to relitigate factual guilt, the Court did not, in doing so, eliminate the notion that evidence of innocence may motivate a court to review alleged constitutional violations. In fact, the Court noted that the miscarriage of justice or actual innocence exception to the cause and prejudice requirement was alive and well, despite the Court's very narrow view of habeas petitions founded solely on claims of factual innocence. 506 U.S. at 404-05.

B. *28 U.S.C. § 2254(e)(2)*

So, it appears that the actual innocence exception described in *Schlup* applies in this case. But that is not the end of the matter. Boerckel supported his claim of actual innocence with numerous reports by an investigator. In order to afford Boerckel an opportunity to present the evidence in support of his claim of actual innocence, the Court conducted a hearing. But, as the State pointed out in its motion for reconsideration, a new provision of § 2254 limits a court's freedom to conduct evidentiary hearings. Does that new provision



require the Court to disregard the hearing transcript? The state argued that it does. The State's position raises two questions: First, does the new provision apply to this case, and second, if it does apply how does it apply?

The United States Court of Appeals for the Seventh Circuit has recently held that many of the new provisions of § 2254 may be applied to cases pending before the new provisions became effective. *Lindh v. Murphy*, No. 95-3608, 1996 WL 517290 (7th Cir. Sept. 12, 1996) (en banc). The newly adopted § 2254(e)(2) provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The Court agrees with the conclusion recently reached by Judge Shadur of the Northern District of Illinois in

an unpublished opinion. In *United States ex rel. Centanni v. Washington*, Nos. 95 C 7393 & 95 C 7394, 1996 WL 556978 (N.D. Ill. Sept. 9, 1996), Judge Shadur ruled that 2254(e)(2) applies to cases pending when it was adopted. That conclusion is not derived directly from, but is clearly required by *Lindh*. Because the Seventh Circuit performed an exhaustive analysis of the retroactivity issue presented by the new amendments to the habeas corpus law, this court will not. It is clear that procedural provisions such as § 2254(e) may be applied to cases pending when the President signed the Antiterrorism and Effective Death Penalty Act of 1996.

How does § 2254(e)(2) apply to this case? The provision prohibits evidentiary hearings if the petitioner has "failed to develop the factual basis of a claim in State court proceedings . . . ." This proceeding is the first time that Boerckel has attempted to show his actual innocence as a way to obtain review of his defaulted claims. Therefore, 2254(e)(2) applies to Boerckel. Boerckel must meet the criteria set forth in § 2254(e)(2)(A) and (B) to receive an evidentiary hearing. Section 2254(e)(2)(A)(i) does not apply because Boerckel's claim does not rest on a new rule of constitutional law made to apply retroactively to habeas cases by the Supreme Court.

To fit within (e)(2)(A)(ii) Boerckel's claim must have "a factual predicate that could not have been previously discovered through the exercise of due diligence." It does not. Boerckel's claim of actual innocence rests on the statements of a number of people that might lead to the conclusion that one Gary Martin and one or two others committed the crime for which Boerckel was convicted. The theory that Gary Martin committed the



crime was known to Boerckel and to his defense counsel in the original trial. In fact, defense counsel questioned witnesses about Gary Martin, who lived in a house behind the victim's. Additionally, discovery provided by the state indicated that Martin had been a police suspect early in the investigation of the crimes. Thus, Boerckel should have pursued the evidence underlying his current claim of innocence at some earlier point. Nothing in the evidence Boerckel sought to put before the Court shows that it was previously unavailable or that it could not have been discovered at some point sooner than 20 years after the original trial.

In addition to showing the prior unavailability of the evidence relied upon, a petitioner seeking an evidentiary hearing must meet the standard in § 2254(e)(2)(B) by showing that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." Even if Boerckel did not fail on (e)(2)(A)(ii), he would fail on (e)(2)(B) because his evidence is not clear and convincing proof of innocence.

The Court concludes that under § 2254(e)(2), it should not have held the evidentiary hearing on Boerckel's claim of actual innocence. Therefore, the Court must ignore the evidence presented at the hearing. That leaves only the proffer Boerckel presented with his supplemental pleading to support his claim under *Schlup v. Delo*.[5]

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[5] The Court will not consider other possible repercussions of § 2254(e)(2), such as the possibility that it has somehow elim-

(continued...)

## III. BOERCKEL'S CLAIM OF ACTUAL INNOCENCE

Boerckel presents no hard evidence indicating his innocence. Instead, he relies on hearsay. Even if that hearsay is admissible, it is not compelling. Furthermore, the evidence at best shows that Boerckel did not act alone.

Taken in the light most favorable to Boerckel, the evidence is that Gary Martin was involved in the rape of Mrs. Draper. The evidence simply cannot be taken to show that Boerckel was not at all involved in the crime. Assuming jurors believed that Gary Martin was involved in the crime is not inconsistent with their conclusion that Boerckel actually committed the rape. In fact, the proffered evidence shows merely that Gary Martin and at least one other person were responsible for the crime. The evidence insinuates that the other person was not Boerckel, but it is not convincing on this point. Finally, the Gary Martin as alternative suspect theory was dangled before the jury in Boerckel's trial and the jury rejected that theory.

This case is not like *Schlup*, in which the evidence in support of the petitioner's claim of actual innocence included sworn statements by eyewitnesses that the petitioner was not involved in the crime, statements by other witnesses that suggested it would have been physically impossible for the petitioner to have committed

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[5] (...continued)
inated the *Schlup* standard by requiring a showing of actual innocence by clear and convincing evidence before a court may consider a claim the factual basis of which the petition did not develop in state court proceedings.



the crime and then have been seen in the locations where he was. 115 S. Ct. 851. Such testimony, if reliable, would have cast serious doubt on the validity of the petitioner's conviction. Therefore, the Supreme Court suggested that a hearing might be appropriate to evaluate the reliability of the petitioner's evidence. *Id.* Boerckel presents no evidence that suggests he was not there when the crime occurred. The only evidence he would offer is evidence that someone else might have participated. Even if Boerckel's evidence is true and totally credible, it is not exculpatory evidence and therefore does not help Boerckel meet the burden of *Schlup*.

The Court finds that Boerckel has shown no cause for his procedural defaults and no prejudice suffered as a result thereof. Furthermore, failing to hear his defaulted claims would not constitute a miscarriage of justice under *Schlup v. Delo*.

## IV. GROUND SIX: ALLEGED BRADY VIOLATION

The preceding conclusion leaves only one claim for the Court to review on the merits. As his sixth ground for relief, Boerckel asserts that he was denied his rights to due process of law by the state's failure to turn over certain exculpatory material. Specifically, Boerckel states that "Defense counsel made a discovery motion that included a request for information regarding any other suspects in the investigation. The court denied the motion and the State did not turn over any information on the other suspects in the case." Amended Petition at 7.

This claim, made under *Brady v. Maryland*, 373 U.S. 83 (1963), is one of the claims Boerckel presented to the Illinois Appellate Court. *People v. Boerckel*, 24 Ill. Dec. 674, 681 (Ill. App. Ct. 5th Dist. 1979). The Illinois Appellate Court rejected the claim:

> The defendant has not directed our attention to any item that was not disclosed as a result of the trial court's ruling that would have tended to negate his guilt. The State indicated in its response to defendant's discovery motion that it was not in possession of any such material. We have no reason to doubt the veracity of that representation. Surely the fact that some other young men in the Litchfield area may have been considered suspects during the preliminary stages of investigation does not indicate that any material developed with respect to them would tend to negate defendant's guilt of these crimes. The trial court did not err in denying discovery as to these materials. "The State is not required to produce a defendant's witnesses or to create his defenses." (*People v. Lightning*, 83 Ill.App.2d 430, 435, 228 N.E. 2d 104, 105.) Moreover, most, if not all, of the information sought by defendant was supplied to him in the form of the investigation report of Litchfield police officer Richard Elledge.

24 Ill. Dec. at 681.

The Court need not question the Illinois Appellate Court's ruling that the material sought was not exculpatory because the court also ruled that the request for discovery was moot because all the information available had been provided to Boerckel.



Pursuant to 28 U.S.C. § 2254(d), this Court may only grant relief on this ground if the Illinois Appellate Court's resolution of the issue:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

§ 2254(d). *See Lindh v. Murphy*, 1996 WL 517290 (applying § 2254(d) to cases pending when the new provision was adopted). The Illinois Appellate Court's ruling on the discovery issue was not unreasonable, it was a sound resolution of an apparently meritless claim. Furthermore, the decision was not contrary to, or an unreasonable application of, clearly established federal law. "For a defendant to succeed on a *Brady* claim, he must show, '(1) that the prosecutor suppressed evidence; (2) that such evidence was favorable to the defense; and (3) that the suppressed evidence was material.'" *United States v. Flores-Sandoval*, 94 F.3d 346, 353 (7th Cir. 1996) (quoting *United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992)). Boerckel's *Brady* claim fails because he has not shown that the prosecutor suppressed any evidence. For that reason, the Illinois Appellate Court's decision was in compliance with, not contrary, to established federal law.

## V. CONCLUSION

The Court concludes that Boerckel's first, second, third, and fifth grounds for habeas corpus relief are procedurally defaulted. No cause exists for the default and failure to adjudicate the claims would not constitute a miscarriage of justice. The Court also finds that Boerckel's sixth ground for relief is without merit.

*Ergo*, Boerckel's Amended Petition for Writ of Habeas Corpus (d/e 44) is DENIED.

ENTER: 28 Oct., 1996.

FOR THE COURT:

RICHARD MILLS
United States District Judge



IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 96-4068

DARREN E. BOERCKEL,

*Petitioner-Appellant*,

*v.*

WILLIAM D. O'SULLIVAN,

*Respondent-Appellee*.

Appeal from the United States District Court
for the Central District of Illinois.
No. 94 C 3258—**Richard Mills**, *Judge*.

ARGUED OCTOBER 20, 1997—DECIDED FEBRUARY 9, 1998

Before BAUER, FLAUM, and KANNE, *Circuit Judges*.

KANNE, *Circuit Judge*. This is a case about comity. Boerckel raises claims in his petition for habeas corpus that he raised in his direct appeal to the Appellate Court of Illinois but that he did not include in his petition for leave to appeal to the Illinois Supreme Court. The district court dismissed these claims as procedurally barred. Between the district court's order and oral argument, this Court revised its approach to this issue in *Hogan v. McBride*, 74 F.3d 144 (7th Cir.), *modified on reh'g denied*, 79 F.3d 578 (7th Cir. 1996), and *Gomez v. Acevedo*, 106 F.3d 192 (7th Cir.), *vacated on other grounds*, ___ U.S. ___, 118 S. Ct. 37 (1997). After considering this subsequent change in our view, we reverse and remand.

## I. HISTORY

In 1976, law enforcement authorities in Montgomery County, Illinois questioned several young men about an incident of rape, burglary, and aggravated battery involving an 87-year-old woman. One of those young men was the petitioner, Darren Boerckel. At the time, Boerckel was a 17-year-old boy with an IQ of approximately 70 and a long-standing reading defect. *See People v. Boerckel*, 385 N.E.2d 815, 821, 824 (Ill. App. Ct. 1979).

After Boerckel received his *Miranda* warnings, the police questioned him for two hours. Promising to take him to see his girlfriend when they were finished, the police obtained a signed confession. One of the officers wrote the confession using the same or similar words to those of Boerckel because Boerckel indicated that he did not write very well. *See id.* at 819. Boerckel was subsequently charged with rape, burglary, and aggravated battery. *See id.* at 817.

Before trial, Boerckel's attorney unsuccessfully attempted to suppress the confession. At trial, prosecutors presented the confession and the fact that Boerckel has the same blood type as the rapist as evidence. A jury convicted Boerckel on all three charges. *See id.* at 818.

Boerckel appealed his conviction to the Appellate Court of Illinois. He argued that the trial court erred in denying his motion to suppress because the confession was fruit of an illegal arrest, he did not receive his *Miranda* warnings properly, and he confessed involuntarily. Boerckel also claimed that the court erred in admitting certain evidence, denying his motion for discovery, denying his motion for a directed verdict since there was insufficient evidence to sustain a conviction, and denying his motion for mistrial because of prosecutorial misconduct. That court affirmed the conviction in a split decision. *See id.* at 824.

Boerckel then filed a petition for leave to appeal to the Illinois Supreme Court, raising only three issues. He questioned whether he was under arrest before he gave incriminating statements, whether prosecutorial misconduct



denied him a fair trial, and whether he was improperly denied discovery. The petition was denied. The United States Supreme Court also denied his petition for *certiorari*. *See Boerckel v. Illinois*, 447 U.S. 911 (1980).

On September 26, 1994, Boerckel filed a *pro se* petition for habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Central District of Illinois. The court appointed counsel on January 31, 1995, and an amended petition was filed on March 15, 1995. The amended petition raised the following issues: 1) whether Boerckel knowingly and intelligently waived his *Miranda* rights; 2) whether his confession was involuntary; 3) whether the evidence against him was insufficient to support a guilty verdict; 4) whether his confession was the fruit of an illegal arrest; 5) whether he received ineffective assistance of both trial and appellate counsel; and 6) whether the prosecution violated his right of discovery under *Brady v. Maryland*, 373 U.S. 83 (1963).

The district court entered an order on November 15, 1995 dismissing the fourth ground of the petition on the merits as barred by *Stone v. Powell*, 428 U.S. 465 (1976). The court also held that Boerckel procedurally defaulted on the fifth ground since it was never raised on direct appeal to any state court but that the sixth ground was properly presented and should be addressed on the merits. Finally, the court determined that Boerckel had procedurally defaulted on the first, second, and third grounds under *Nutall v. Greer*, 764 F.2d 462 (7th Cir. 1985), because these grounds were not included in the petition for leave to appeal to the Illinois Supreme Court. These grounds were procedurally barred because the time period in which Boerckel could have raised them to the Illinois Supreme Court had passed.

After these initial rulings, the court requested additional briefing. Specifically, the district court asked Boerckel to address the issue of cause for or prejudice from his procedural defaults on the first, second, third, and fifth grounds. The court also directed the State to respond to the merits of Boerckel's petition, which it had not done in its initial re-

sponse. Boerckel did not articulate any cause for his procedural defaults. Instead, he argued that the court may hear his claims under the actual innocence or fundamental miscarriage of justice exception to the rule of procedural default.

On July 24, 1996, the court set the matter for hearing. At the hearing, Boerckel presented witnesses who testified that, in the years since his conviction, two men have made statements that they committed the rape for which Boerckel was convicted.

On October 28, 1996, the district court found that the recent amendments to 28 U.S.C. § 2254 prohibited an evidentiary hearing[1] and that the court must ignore the evidence presented at the trial. The court added, however, that even if it believed the witnesses, it would only establish that others were present, not that Boerckel was not present. The district court further found that Boerckel had procedurally defaulted on his first, second, third, and fifth grounds for habeas corpus relief and that he failed to show cause for the default.

Boerckel appealed to this Court.

## II. ANALYSIS

The sole issue in this appeal is whether, by failing to raise claims in his petition for leave to appeal to the Illinois Supreme Court, Boerckel procedurally defaulted on his claims that 1) he did not knowingly and intelligently waive his *Miranda* rights, 2) his confession was involuntary, and

[1] When the district court made this determination, it relied on this Court's interpretation of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214, in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (holding that courts may apply the statute retroactively). The Supreme Court has subsequently reversed our interpretation of this issue. *See Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059 (1997). On remand, the district court should apply § 2254 as it existed before these amendments.



3) the evidence against him was insufficient to support a guilty verdict.

### A.

Before a federal court may address the merits of a § 2254 habeas petition, a petitioner must provide the state courts with a full and fair opportunity to review his claims. *See Picard v. Connor*, 404 U.S. 270, 276 (1971); *Farrell v. Lane*, 939 F.2d 409, 410 (7th Cir. 1991). In particular, a petitioner must exhaust his state remedies, *see* 28 U.S.C. § 2254(b), (c), and avoid procedurally defaulting his claims during the state court proceedings, *see United States ex rel. Simmons v. Gramley*, 915 F.2d 1128, 1132 (7th Cir. 1990). The doctrines of exhaustion and procedural default both "involve situations in which a failure to present a claim in the state courts bars the granting of federal habeas corpus relief in the federal courts." *See* James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 23.1 n.9 (1988 & supp. 1993). The doctrines, however, are distinct and have different ramifications.

#### 1.

The exhaustion doctrine is an ordering device. In *Ex Parte Royall*, 117 U.S. 241 (1886), the Supreme Court held that federal courts should not, for reasons of comity and deference to state courts, entertain a claim in a habeas corpus petition until after the state courts have had an opportunity to hear the matter. *See id.* at 252-53. Subsequently incorporated into the habeas statute, the doctrine states that individuals in state government custody may bring a habeas corpus petition only if they have exhausted the remedies available in state court or "there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights" of that individual. 28 U.S.C. § 2254(b). "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he

has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c).

Read narrowly, this language appears to prevent federal courts from concluding that a petitioner has exhausted his remedies if there exists any possibility of further state court review. The Supreme Court has expressly rejected this interpretation. *See Brown v. Allen*, 344 U.S. 443, 447, 448-49 n.3 (1953) (holding that the exhaustion doctrine does not require habeas petitioners to seek state collateral relief based upon the same evidence and issues once the state courts have already ruled on the claim on direct review). Instead, federal court review is delayed until the state has had a chance to correct any errors in its law or procedures. *See, e.g., Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (*per curiam*) (stressing that exhaustion requirement allows state courts an "initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights") (quoting *Fay v. Noia*, 372 U.S. 391, 438 (1963)).

Thus, the exhaustion doctrine allows the state court system to decide the merits of the claim first. An exhaustion question is only one of timing, not jurisdiction. It determines not whether but when a federal court will consider a habeas corpus petition. *See Fay*, 372 U.S. at 418 ("This qualification plainly stemmed from considerations of comity rather than power, and envisaged only the postponement, not the relinquishment, of federal habeas corpus jurisdiction."); *see also* Matthew L. Anderson, Note, *Requiring Unwanted Habeas Corpus Petitions to State Supreme Courts for Exhaustion Purposes: Too Exhausting*, 79 Minn. L. Rev. 1197, 1201-02 (1995).

2.

The failure to use available state procedures, however, likely will prevent federal habeas corpus relief, not because of exhaustion problems, but rather because the petitioner will have forfeited his claim by violating a state procedural rule. *See* Liebman & Hertz, *supra*, § 23.1 n.9.



The doctrine of procedural default bars federal habeas review when a state court declines to address a prisoner's federal claims because the defendant has not met a state procedural requirement. *See Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *see also Ulster County Court v. Allen*, 442 U.S. 140, 148 (1979); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a default occurs, federal relief is foreclosed because the default constitutes an independent and adequate state ground on which the decision rests. *See* Liebman & Hertz, *supra*, § 23.1 n.9.

On both direct review and habeas review, the Supreme Court has held that it will not consider an issue of federal law from a judgment of a state court if that judgment rests on a state law ground that is both "independent" of the merits of the federal claim and an "adequate" basis for the court's decision. *See Harris v. Reed*, 489 U.S. 255, 260 (1989); *see also Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 635-36 (1875). Without the independent and adequate state ground doctrine, habeas petitioners would be able to avoid the exhaustion requirement by failing to satisfy a state's procedural rules, rendering the defaulted state remedies unavailable. *See Coleman*, 501 U.S. at 732. Thus, "[t]he independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases," *id.*, by requiring petitioners to satisfy a state's procedural rules and exhaust their state remedies or face the penalty of having their claims barred from federal habeas review.

B.

When the district court heard Boerckel's petition, this Court believed that a federal habeas petitioner forfeited the right to habeas relief if he did not seek review in a state's highest court of all the claims presented in his habeas petition. *See Nutall v. Greer*, 764 F.2d 462, 463-64 (7th Cir. 1985); *see also Lostutter v. Peters*, 50 F.3d 392 (7th Cir.

1995); *Jones v. Washington*, 15 F.3d 671, 675 (7th Cir. 1994); *Mason v. Gramley*, 9 F.3d 1345 (7th Cir. 1993). Then, in 1996, this Court revised its approach to the doctrine of procedural default.

1.

In *Hogan v. McBride*, this Court reconsidered whether a federal habeas petitioner forfeits a claim that is not included in a discretionary petition for transfer to the state's highest court. *See* 74 F.3d at 144. In *Hogan*, the petitioner did not include a confrontation claim in his discretionary appeal to Indiana's highest court, and the district court deemed this claim forfeited as a procedural default under *Wainwright*, 433 U.S. at 72. *See Hogan*, 74 F.3d at 145.

The Court evaluated whether Indiana law encourages petitioners to be selective in the presentation of their claims to the Indiana Supreme Court, recognizing that "[f]orfeiture under § 2254 is a question of a state's internal law: failure to present a claim at the time, and in the way, required by the state is an independent state ground of decision, barring review in federal court." *Hogan*, 74 F.3d at 146 (citing *Coleman*, 501 U.S. at 729-44; *Harris*, 489 U.S. at 244). After reviewing Indiana's appellate rules, it concluded that Indiana "discourages litigants from raising every possible claim of error, which implies that omission is not to be penalized." *Hogan*, 74 F.3d at 146. Thus, the Court concluded that "[t]he claim was not forfeited; it was resolved on the merits; and when the last state court to address a question reaches the merits without invoking a rule of forfeiture, the question is open on collateral review under § 2254." *Id.* (citing *Ylst v. Nunnemaker*, 501 U.S. 797 (1991); *Coleman*, 501 U.S. at 732-35).

The Court also explained why *Nutall* and its progeny were erroneous. "*Nutall* was decided before the Supreme Court refined the forfeiture doctrine in *Harris*, *Coleman*, and *Ylst*. These opinions establish that § 2254 asks whether an independent and adequate state ground supports the



decision. Forfeiture depends on state law . . . ." *Hogan*, 74 F.3d at 147. Thus, "[i]f the prisoner has presented his argument to the right courts at the right times—as the states define these courts and times—then the claim is preserved for federal collateral review." *Id.*

2.

In *Gomez v. Acevedo*, the Court applied its *Hogan* analysis to determine whether Gomez defaulted on a claim by not including it in his petition to the Illinois Supreme Court. *See* 106 F.3d at 196. After reviewing Illinois case law, the Court determined that a petition for leave to appeal "'is not necessarily an adversary proceeding to which the application of . . . the doctrine of waiver . . . is appropriate.'" *Id.* (quoting *People v. Edgeworth*, 332 N.E.2d 716, 720 (Ill. App. Ct. 1975). Also, the Court noted that a denial of leave to appeal "'carr[ies] no connotation of approval or disapproval of the appellate court action.'" *Gomez*, 106 F.3d at 196 (quoting *People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979)). Thus, it concluded that Gomez did not procedurally default by failing to present a claim to the Illinois Supreme Court. *See* 106 F.3d at 196.

C.

O'Sullivan argues that this Court's analysis in *Hogan* and holding in *Gomez* are erroneous and that we should return to our previous view of procedural default and dismiss Boerckel's claims as defaulted. He claims that an exception exists to the general rule that "'a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.'" *Coleman*, 501 U.S. at 735-36 (quoting *Harris*, 489 U.S. at 263). Specifically, O'Sullivan highlights a footnote in *Coleman* which states that this clear statement rule "does not apply if the petitioner failed to exhaust state remedies and the court to

which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." 501 U.S. at 735 n.1. In such a scenario, the Supreme Court reasoned that a procedural default exists "for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.*

O'Sullivan believes that the exception to the rule announced in *Coleman* is precisely the situation in this case. Boerckel did not raise three claims to the Supreme Court of Illinois that he raises in his habeas petition, and the time for filing a petition to that court has long passed. *See* Ill. S. Ct. R. 315(b). Thus, he contends that Boerckel procedurally defaulted by not presenting these claims to the Illinois Supreme Court.

1.

In *Hogan* and *Gomez*, this Court evaluated the state law of forfeiture to determine whether Indiana and Illinois penalized litigants for not including claims in petitions to the Indiana and Illinois Supreme Court. *See* 74 F.3d at 146; 106 F.3d at 196. By raising the question of whether Boerckel has exhausted his state remedies as a preliminary inquiry in determining whether Boerckel has procedurally defaulted, O'Sullivan has shifted the focus of our analysis. The critical issue in responding to O'Sullivan's argument is not whether the state court relied on a procedural rule to conclude that the petitioner procedurally defaulted on the claim. Rather, it is whether the petitioner's refusal to include all his claims in his petition for leave to appeal to the Illinois Supreme Court constitutes a failure to exhaust his state court remedies, which thereby bars him from raising them in his habeas petition under the doctrine of procedural default.

As we noted earlier, a petitioner exhausts his remedies when he provides the state courts with a full and fair opportunity to review his claims. *See Keeny v. Tamayo-Reves*,



504 U.S. 1, 10 (1992); *Picard*, 404 U.S. at 276. Even though O'Sullivan's argument alters our analysis, the result remains the same. We hold that the exhaustion requirement of § 2254 does not require a petitioner to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court to exhaust his state remedies.[2]

2.

The key to solving the puzzle of how many chances a petitioner must give the state courts to review his claims lies in the language of § 2254. Section (c) provides that "[a]n applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has *the right* under the law of the State *to raise*, by any available procedure, *the question presented*." 28 U.S.C. § 2254(c) (emphasis added). Codified in 1948, this section incorporated the common law on exhaustion. *See Rose*, 455 U.S. at 515; *see also Ex parte Hawke*, 321 U.S. 114, 116-17 (1944). The question, however, has always remained: "*'To what extent* must the petitioner who seeks federal habeas exhaust state remedies before resorting to the federal court?'"

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[2] Although we refuse O'Sullivan's invitation to stray from our established position, we note that other circuits are split on this issue. *Compare Jennison v. Goldsmith*, 940 F.2d 1308, 1310 (9th Cir. 1991) (*per curiam*) (Petitioner must seek discretionary review in Arizona state courts; "the right to raise" an issue does not entail a right to have that issue considered on its merits.); *Grey v. Hoke*, 933 F.2d 117, 119 (2d Cir. 1991) (Petitioner must present claim to highest court of the state before a federal court may consider its merits.); and *Richardson v. Procunier*, 762 F.2d 429, 431-32 (5th Cir. 1985) (Petitioner must seek discretionary review in the Texas Court of Criminal Appeals.) *with Dolny v. Erickson*, 32 F.3d 381 (8th Cir. 1994) (Petitioner need not request discretionary review in Minnesota Supreme Court.); and *Buck v. Green*, 743 F.2d 1567, 1569 (11th Cir. 1984) (For purposes of § 2254, Georgia defendant who lost appeal as a matter of right, need not petition the Georgia Supreme Court for *certiorari*, given that court's limited jurisdiction.).

*Castille v. Peoples*, 489 U.S. 346, 349-50 (1989) (Scalia, J., for unanimous Court) (quoting *Wainwright*, 433 U.S. at 78) (emphasis added in *Castille*). We interpret the right to raise the question presented to mean more than simply the ability to present a question to a court and request an opportunity to be heard. *See Dolny*, 32 F.3d at 384 (stressing that "'[t]he right . . . to raise' an issue referred to in § 2254 means more than a mere opportunity to seek leave to present an issue; it means a realistic, practical chance to present an issue and have it considered on the merits"); Liebman & Hertz, *supra*, § 23.4. We believe an applicant has exhausted the remedies available if he takes advantage of whatever appeals the state system affords as of right.

3.

In Illinois, the right of a petitioner to have his claim considered by the Illinois Supreme Court is restricted. It is within the sound judicial discretion of the Illinois Supreme Court to decide whether to review the bulk of the decisions of the Appellate Court of Illinois. *See* Ill. S. Ct. R. 315(a); *see also Bowman v. Illinois Cent. Ry. Co.*, 142 N.E.2d 104 (Ill. 1957). In determining whether to grant a petition for leave to appeal, the court evaluates criteria which include "the general importance of the question presented; the existence of a conflict between the decision sought to be reviewed and a decision of the Supreme Court, or of another division of the Appellate Court; the need for the exercise of the Supreme Court's supervisory authority; and the final or interlocutory character of the judgment sought to be reviewed." Ill. S. Ct. R. 315(a); *cf. Hogan*, 74 F.3d at 146 (determining that Indiana's appellate rules are similarly constructed); *Dolny*, 32 F.3d at 384 (similar in Minnesota); *Buck*, 743 F.2d at 1569 (similar in Florida). The fact that Illinois discourages litigants from raising every possible claim of error is evidence that Illinois does not consider it necessary that petitioners raise all of their claims to exhaust their remedies.



Moreover, Illinois recognizes that its Supreme Court's practice is similar to the *certiorari* procedure in the United States Supreme Court. *See* Ill. S. Ct. R. 315 Comm. Cmts. The denial of a leave to appeal is not a decision on the merits of a case just like the "'denial of a writ of certiorari imports no expression of opinion upon the merits of the case.'" *Teague v. Lane*, 489 U.S. 288, 296 (1989) (plurality) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)); *see also People v. Vance*, 390 N.E.2d 867, 872 (Ill. 1979). In *Fay v. Noia*, the Supreme Court recognized that a petitioner's failure to timely seek *certiorari* in the Supreme Court does not bar a state prisoner from federal habeas relief. *See* 372 U.S. 391, 435 (1963), *overruled on other grounds by Coleman*, 501 U.S. at 748-51. To remain consistent with *certiorari* practice, Boerckel's decision not to include all of his claims does not bar him from federal habeas relief.

4.

Also, we can infer that a petitioner provides state courts with a fair presentation of his claim in his appeal as of right, not in a petition for leave to appeal. *See Wilwording*, 404 U.S. at 250.

In *Castille*, the Supreme Court held that a prisoner who raised an issue for the first time on a petition to the Pennsylvania Supreme Court for allocatur did not provide the state courts with "fair presentation" of the claim for purposes of the exhaustion requirement. *See* 489 U.S. at 351. Under Pennsylvania law, allocatur review is not a matter of right, but of sound judicial discretion, and an appeal is allowed only when there are special and important reasons. *See* Pa. R. App. Proc. 1114. The court concluded that raising a claim in a procedural context in which discretion exists to refuse to consider the merits does not constitute "fair presentation." *See Castille*, 489 U.S. at 351; *see also Cruz*, 907 F.2d at 669 (holding that a petitioner did not exhaust his state remedies by merely submitting a claim to the Illinois Supreme Court).

Then, in *Ylst*, the Supreme Court considered whether a state prisoner procedurally defaulted his habeas claims when an unexplained denial for state habeas corpus followed a rejection of the same claim by the state's appellate court on direct appeal. *See* 501 U.S. at 799. In concluding that the prisoner procedurally defaulted, the court reasoned that the prisoner "had exhausted his . . . claim by presenting it on direct appeal, and was not required to go to state habeas at all." *Id.* at 805.

Thus, if Boerckel must provide state courts with an opportunity to correct any alleged violation of his federal rights and a petition for leave to appeal does not constitute this opportunity, *see Castille*, 489 U.S. at 351, and Boerckel is not required to seek state habeas proceedings, *see Ylst*, 501 U.S. at 805, then a petitioner provides the state courts with the required opportunity in the petitioner's direct appeal as of right.



Our holding is also consistent with the principles underlying the exhaustion requirement. Comity is the primary basis for the exhaustion requirement. *See Rose v. Lundy*, 455 U.S. 509, 515 (1982); *Hawk*, 321 U.S. at 117.

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

*Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)); *see also Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (*per curiam*) (noting that the exhaustion requirement "serves to minimize friction between our federal and



state systems of justice by allowing the State an initial opportunity to pass upon and correct alleged violations of prisoners' federal rights").

Boerckel provided Illinois state courts with an opportunity to review the matter in his direct appeal. Federal courts do not snatch claims from state courts when they review claims not included in discretionary petitions to state supreme courts. Our refusal to bar Boerckel from habeas review is a recognition of the inequity of penalizing a petitioner for following the requirements a state imposes on its second tier of appellate review. Allowing petitioners to exercise the discretion provided them by the states in selecting claims to petition for leave to appeal does not offend comity.

We also note that requiring petitioners to argue all of their claims to the state supreme court would turn federalism on its head. If a state has chosen a system that asks petitioners to be selective in deciding which claims to raise in a petition for leave to appeal to the state's highest court, we seriously question why this Court should require the petitioner to raise all claims to the state's highest court if he hopes to request habeas review. The exhaustion requirement of § 2254 does not require such a result.

Moreover, contrary to O'Sullivan's suggestion, this decision will not "obliterate any opportunity for a state's highest court to protect federally secured rights because it will leave state prisoners with little incentive to petition state supreme courts." Respondent Br. at 19. It is difficult to imagine that this holding will induce attorneys and defendants in state government custody to withhold an appropriate claim in a petition for leave to appeal to the state's highest court, knowing that it cannot hurt and could only potentially help their cause. O'Sullivan's argument assumes a remarkably risk-prone group of defendants and attorneys, especially given the fact that "the success rate at trial and on appeal, while low, is greater than the success rate on habeas corpus." *See* Judith Resnik, *Tiers*, 57 S. Cal. L. Rev. 837, 894 (1984). We do not believe that it accurately pre-

dicts the effect our holding will have on the incentives to petition the Illinois Supreme Court.

Finally, we reiterate our concern that "[t]reating an omission from a petition for a discretionary hearing as a conclusive bar to federal review under § 2254 could create a trap for unrepresented prisoners, whose efforts to identify unsettled and important issues suitable for discretionary review would preclude review of errors under law already established." *Hogan*, 74 F.3d at 147.

We therefore hold that Boerckel exhausted his state remedies by including these claims in his direct appeal to the Appellate Court of Illinois. The exhaustion principle of § 2254 does not require him to include all of his claims in a petition for leave to appeal to the Illinois Supreme Court. Thus, we do not need to reach the question of whether the Illinois Supreme Court would find these claims procedurally barred because of its timing requirement. For these reasons, we REVERSE the district court's dismissal of Boerckel's habeas petition and REMAND for further proceedings consistent with this decision.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*



DARREN E. BOERCKEL, Petitioner-Appellant,
v.
WILLIAM D. O'SULLIVAN, Respondent-Appellee.

No. 96-4068

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1998 U.S. App. LEXIS 6150

March 20, 1998, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Central District of Illinois, No. 94 C 3258. Richard Mills, Judge.

Original Opinion of February 9, 1998, Reported at: *1998 U.S. App. LEXIS 1768*.

COUNSEL: For DARREN E. BOERCKEL, Petitioner - Appellant: David B. Mote, Richard H. Parsons, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Springfield, IL USA.

For WILLIAM D. O'SULLIVAN, Respondent - Appellee: Catherine Glenn, OFFICE OF THE ATTORNEY GENERAL, Criminal Appeals Division, Chicago, IL USA.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. JOEL M. FLAUM, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested

a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.